



# ON COPYRIGHT

## Copyright in the networked world: orphaned copyrights

Copyright in the networked world

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### Abstract

**Purpose** – This column aims to look at the results of the US Copyright Office's request for comments about orphan copyrights.

**Design/methodology/approach** – It uses a form of Game Theory called the Prisoner's Dilemma Game to analyze the comments that are available on the Copyright Office web site.

**Findings** – Some change seems likely, if only because the opponents of change may discover that they can gain more for themselves when they stop defending the interests of those who have abandoned their copyrights already.

**Practical implications** – If some form of cooperation between intellectual property consumers and rights holders could be worked out for orphan copyrights, it might lead to further "tit-for-tat" reactions that help to address other copyright issues.

**Originality/value** – Provides useful information on orphan copyrights.

**Keywords** Copyright law, Internet, Publishing

**Paper type** Research paper

### Introduction

According to the copyright law in every country that signed the Berne Treaty, which includes virtually every country in the world, the copyright holder has the exclusive right to give permission for copies of a work to be made and distributed. But what happens when the person wishing to make a copy cannot locate the rights holder to request a permission? This is the essence of the "orphaned copyright" problem.

The causes vary. Some rights holders in effect abandon their copyrights when they no longer have (or appear to have) any economic value. Other rights holders are hard to find. Some rights holders merely appear to be hard to find when they do not respond to requests because the probable cost in time and trouble of responding is greater than the expected amount the requestor would likely pay. And some requestors lack the means or skill to do a thorough search for the rights holders.

This column analyzes the orphaned copyright issue presented in the US *Federal Register* of 2 January 2005 using a game theory technique called the Prisoner's Dilemma. Game theory is widely used in economic research. As in the Prisoner's Dilemma, the orphaned copyright situation offers two competing parties: the rights holder, and the person or institution wanting to use the work. Game theory helps to understand when and where collaboration makes sense, and what the consequences of non-cooperation are.



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Game theory

Kuhn’s (2003) entry in the *Stanford Encyclopedia of Philosophy* offers a good overview for those unfamiliar with the Prisoner’s Dilemma game. It begins with two prisoners who are isolated from one another in separate cells. The prosecutor suspects them of a serious crime, but has only evidence of minor infractions. He offers each a deal: confess and betray the other, and go free (if the other does not confess). If both confess and betray the other, their sentences will be lighter, but still involve prison time. If both cooperate with other by refusing to confess, they face only nominal charges, but refusing to confess and betray the other exposes each to the danger of taking the full blame and a maximum sentence. The choices are usually described in Figure 1.

Many variations on this basic situation are possible, including situations where some communication is possible, and multiple rounds where the prisoners can base their choice on whether they were betrayed or cooperated with in previous rounds. One of most important ironies of the prisoners’ dilemma is that “both players defecting is the game’s only strong Nash equilibrium, i.e. it is the only outcome from which each player could only do worse by unilaterally changing its move.” Yet if both betray the other because it is in their best interests individually, they are both worse off than if they had cooperated with each other and refused to confess.

The two sides of the copyright debate have an relationship which resembles the prisoners’ dilemma. Rights owners groups and open access groups have created barriers that make it hard to communicate with each other, and when each side pursues its own pure self-interest, it takes extreme positions and refuses to cooperate. Then the rights owners lose because people steal works they cannot get any other way, and open access loses because of lawsuits to force compliance.

The current situation might be viewed as the third round of a prisoners’ dilemma game in which the 1978 Commission On New Technological Uses for copyrighted materials (CONTU) represented a first effort with moderate cooperation on both sides, and the 1997 Conference On Fair Use (CONFU) represented a second round where cooperation broke down, partly because both sides had grown to feel that they had been at least partly betrayed in the CONTU results.

The current situation could also be viewed as a multi-round sequence based on legislative changes and popular response. In recent years, especially since the Digital Millennium Copyright Act of 1998, both open access advocates and rights owners have felt as if they lost, the former because of the criminalization of any attempt to circumvent technological protections in the DMCA, and the latter because the internet-using public has persistently ignored copyright, especially in areas like music file-sharing. The TEACH Act of 2002 offered similar mixed blessings for each side. The technology protection requirements for invoking the TEACH act are daunting, but the act does in fact allow substantially more materials to be used for the virtual equivalent of face-to-face teaching, which can be seen as an erosion of owners’ rights.

	“A” Cooperates	“A” Defects (ie betrays the other by confessing)
“B” Cooperates	Both rewarded with nominal charges	“A” rewarded by going free; “B” punished severely
“B” Defects (ie betrays the other by confessing)	“B” rewarded by going free; “A” punished severely	Both suffer moderate punishments

Figure 1.  
Classic Prisoner’s dilemma choices

In general in multi-round prisoner dilemma games, “tit-for-tat” behavior in which the player “cooperates on the first round and imitates its opponent’s previous move thereafter” (Kuhn, 2003) scores the highest in tournaments. While that can lead to sequences of destructive retaliation, it also means that a modest effort at cooperation may be rewarded with more. The initial written comments about orphaned copyrights suggests at least some potential for new cooperation.

### Orphan copyright comments overview

The US Copyright office requested comments about “the issues raised by ‘orphan works,’ i.e. copyrighted works whose owners are difficult or even impossible to locate.” (*Federal Register*, 2005). The Copyright Office received 721 comments by the 25 March 2005 deadline, 94 (13 percent) from persons representing institutions of which 15 (2 percent) came from libraries. The second round of direct responses to these comments was due by 9 May 2005, and received 146 comments of which 49 (34 percent) came from persons representing institutions. In practical terms, those purely from private persons probably carry little weight, except in so far as they might represent some subtle voter preference.

It is difficult to classify the comments as simply for or against change, since many of those opposing change say that they can accept change as long as it does not affect their privileges as rights holders (as most changes inevitably would), and some of those favoring change believe in limiting it. Those opposing change realize that the very existence of this Copyright Office request for comments means that significant pressure exists for some solution to the orphan copyright problem, and those favoring change know that Congress in recent years has tended to side with the rights holders. If the comments were treated as a straw poll, and personal (non-institutional) responses are excluded, the ratio is about 4 to 1 in favor of change. Comments by private persons are overwhelmingly in favor of change, though generally vague about what that change should be.

### Comments by proponents

Libraries, museums, and related cultural heritage organizations represented the great mass of institutional comments in favor of changing the law to address the orphan copyright problem. Many institutions eschewed specific legislative recommendations and focused on describing the kind of solution they wanted. My own comment on behalf of Michigan State University was typical (Seadle, 2005):

We recommend: 1) that a standard fee be charged for the use of works determined to be orphaned, and 2) that a mechanism be established that can determine orphaned status quickly and efficiently. For educational use, both a timely determination and predictable costs are important.

This comment represents not just the library, but the whole university, and therefore involved approval by the university’s legal counsel and top administration. It is not always clear in many of the comments by individual library directors whether they are in fact speaking for the university as a whole, or speaking only on behalf of the institution’s library.

Keller’s (2005) response on behalf of the Stanford University appears, like mine, to speak on behalf of the whole university. He is bolder and more specific in his proposals:

Under an amendment to section 108(h) envisioned by Stanford, libraries and archives, including non-profit educational institutions, would be expressly permitted to make certain uses of presumptively orphaned works, or Archive and Library Orphan Works (ALOW). An ALOW would be any work included under section 108(i) where:

- 1) the work was first published 28 or more years ago;
- 2) the work is no longer in-print, as demonstrated by reference to recognized industry publications; and
- 3) the rights-holder has not excluded the work from the ALOW program through a designation filed with the Copyright Office.

For use by non-profit institutions, Keller's proposal would, in effect, restore the term for copyright protection that existed under the 1909 law. A rights holder could expressly exclude a work from use after the 28-year term, just as a rights holder under the 1909 law could apply for a renewal. Any work still in print would automatically be excluded from orphan status. This would increase enormously the number of works available for scholarly use, while not harming anyone profiting or expecting to profit from their creations.

Not all proposals were equally radical. In responding for the Copyright Clearance Center, Funkhouser (2005) proposed no change to the law, but suggested establishing a registry that would make it easier to find rights holders:

CCC believes that a works/ownership Registry would be of significant benefit to both copyright rightsholders and users (including subsequent creators). In our conception, a voluntary Web-based Registry would, on the one hand, hold information about works, rights and their rightsholders, and would offer simple search tools for potential users to locate information that they seek about existing works. On the other hand, while searching the Registry alone would and should carry with it no legal presumption of having completed the necessary diligence in seeking a rightsholder ... A voluntary Registry would impose a minimal burden on copyright rightsholders and would require no alteration of the existing copyright registration system ...

This modest proposal seems unlikely to trouble rights holders, and is something that the CCC could put in place on its own. The question is, of course, how many rights holders would take the trouble to fill in the information at the registry. It seems unlikely that every web page author would bother, and yet their copyright-protected works are among the swiftest to fall into orphan status.

### **Comments by opponents**

Comments by the opponents to change may be classified into three groups by how they would limit change. The mildest form of opposition tries to limit change by giving special exemptions to particular interest groups, including libraries and museums. An example comes from the Picture Archive Council of America (Wolff, 2005):

It may be that museums, libraries and institutions receive broader exemptions from copyright infringement under a revised Section 108 of the Copyright Act, rather than providing a broad exemption to all users that would undermine copyright protection to images.

This reply builds on existing legislation that grants exemptions that libraries and museums have used so cautiously that they might almost not be in the law. The most important of these is the provision that libraries may make materials available within

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the last 20 years of their copyright period, unless the rights owner objects. This could be a major factor in mass digitization projects such as Google and the University of Michigan are undertaking.

Other opponents are content to suggest that no problem exists in their area of interest. The Recording Industry Association of America (RIAA) offered typical reply (Marks, 2005):

Our review of the comments suggests that there appears to be widespread – indeed, almost unanimous – agreement that there is no serious orphan works problem with respect to commercially released sound recordings protected by federal copyright.

Even though recorded music is one of the major battlegrounds for copyright, it was not discussed extensively in the comments (except by opponents to change), because the commercial recording industry maintains a well-organized list of rights owners, and has effective agencies through which a person can reliably get a permission (for a price).

The third group of opponents recognize that some change may happen, but want it to be minimal. This was a large group whose message took many forms. One was to suggest that resources to solve the orphan copyright problem already exist. For example, the Entertainment Software Association (2005) wrote:

ESA does not believe legislative changes to accommodate a so-called “orphan works” problem, that would thereby affect copyright protection for entertainment software, are justified or advisable at this time. We believe that some commentators who argued for such changes in initial comments may be unaware of available resources to help them locate the owners of video and computer games.

Another example comes from the Association of American Publishers, the Association of American University Presses, and the Software and Information Industry Association, which warned against excessive bureaucratization (Adler *et al.*, 2005):

Both take a “minimalist” approach that is intended to require the fewest possible changes to current U.S. copyright law, no impact on US obligations under international copyright agreements, and the least possible bureaucratic impact on governmental entities and on owners and users of copyrighted works.

Microsoft Corporation repeats the warning against a government administered solution, and advocates for marketplace solutions (Rubin, 2005):

While Microsoft welcomes the Office’s efforts to assess whether the balance between users and copyright owners rights under the copyright law with respect to orphaned works can be improved, we question whether the establishment of a statutory licensing framework or layer of governmental administration would be necessary or appropriate to achieve such a balance. In our view, it is preferable to consider approaches that – consistent with US copyright law and policy and international norms – avoid compulsory or government-administered licensing or royalty collection systems to compensate uses of orphaned works. If the work is truly orphaned, there will be no one to receive the compulsory license fees. If the work proves not to be orphaned, traditional approaches to marketplace exploitation should prevail.

The fourth group offers little scope for compromise or cooperation. Some expressed their outrage at the idea that the law dilute any of their rights and privileges. The statement of the American Society of Composers, Authors, and Publishers (ASCAP) took a strong philosophic stance against users’ rights (Mosenkis, 2005):

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One common thread joins all of these proposals – they would limit the exercise and enjoyment of copyright owners exclusive rights. The Copyright Office should remain mindful that any future legislative or regulatory action that implements such proposals will encroach on the rights of copyright owners, and should not be taken without compelling policy reasons. Indeed copyright serves its constitutional objective by giving the owner – not the user – the right to control the use of copyrighted works.

ASCAP's conclusion reiterates a belief in the primacy of authors' rights that many scholars might find hard to reconcile with the constitutional basis for copyright as a means of promoting knowledge:

In weighing issues involving orphan works, ASCAP urges that the copyright Office remain mindful of the purpose of copyright protection – implementation of any orphan copyright legislation or regulation would inevitably erode authors' rights.

The Illustrators Partnership made the most combative response, which treated other comments as evidence of what they see as the real problem, and proposing an uncompromising solution that would strengthen their position (Holland and Turner, 2005):

The broad diversity of comments received by the Orphan Works study illuminates what we believe is a spreading indifference to creators' rights . . . The Illustrators' Partnership believes that existing copyrights on all visual works should be maintained and we hope that copyright law can be strengthened to protect against the growth of abuse.

### Conclusion

The Prisoner's Dilemma game is complex and this column has looked at only a few of the simplest scenarios. It certainly cannot predict the outcome of this latest round of copyright discussions, but it can help to clarify strategies. The extreme statements and distaste for compromise expressed in some comments make sense in terms of the self-interest of parties who believe they have little to gain from cooperation. A Prisoner's Dilemma scenario in which the reward for cooperation seems less than the incentive to betray makes the latter even more attractive.

The reason for that imbalance has many roots, including the personal dislikes that have fed on decades of conflict, and the perceived tendency of recent Congresses to favor business-friendly market solutions over education. Whether the latter is true matters less than whether the players believe it to be true.

This does not mean that the outcome is likely to favor rights' owners organizations. The fact of this request for comment shows the strong pressure to address the orphan copyright problem. Many commercial firms have discovered that orphan copyrights are hindering their business. The current battle is not merely non-profits versus for-profits, but a broad alliance of intellectual property consumers versus absentee rights owners. Some change seems likely, if only because the opponents of change may discover that they can gain more for themselves when they stop defending the interests of those who have abandoned their copyrights already.

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